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No. 91-996

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

PEOPLE OF THE STATE OF CALIFORNIA PETITIONER

vs.

CESAR ELIAS CRIBAS RESPONDENT

ON WRIT OF CERTIORARI

TO THE COURT OF APPEAL FOURTH APPELLATE DISTRICT
DIVISION THREE OF THE STATE OF CALIFORNIA

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REQUEST TO FILE SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 15.

This supplemental brief in opposition is provided to assist this Court in deciding whether to grant or deny the petition filed in this case. This Court requested a response by letter dated February 19, 1992. The response filed February 18 along with this supplemental brief in opposition sets forth respondent's position and reasoning in support of denial of the petition.

ARGUMENT

I

THE STATEMENTS OF RESPONDENT WERE NOT "OTHERWISE VOLUNTARY AND TRUSTWORTHY" ON THEIR FACE.

Every single case cited by petitioner in support of a grant of certiorari required that the impeaching statements taken in violation of a constitutionally mandated rule be otherwise trustworthy and voluntary. Respondent agrees with Argument IV in the Reply to the Brief In Opposition. The gist of that argument is that this Court may independently review facts that are mingled with legal conclusions when deciding whether or not to grant certiorari.

In this case, the facts underlying the constitutional principles involved reveal statements made by an incarcerated defendant with appointed counsel. Those statements were elicited by his accuser at the behest of the police and with a promise of help to secure his release if he affirmed the truth of her accusations.

On their face, these recorded statements cannot meet the test of voluntariness and trustworthiness which test is a condition precedent to use for <u>any</u> purpose in a trial.

In <u>Michigan v. Harvey</u> 494 U.S. 344, 351, (1990) Chief Justice Rehnquist, writing for the majority, stated "[w]e have mandated the exclusion of reliable and probative evidence for <u>all</u> purposes only when it is derived from involuntary statements." (emphasis in the

original.) This Court went on to hold that the record did not allow a determination as to the voluntariness of Harvey's waiver of his rights. There was no objection below to Harvey's statement, no record was developed in the trial court on that issue. That is not the case here.

It is submitted that, based on the extensive record developed below, the statements by respondent, given under the circumstances occurring here, are unreliable,involuntary and untrustworthy.

No case cited by petitioner, where statements were precluded from use in the government's case but allowed to impeach, comes even close to replicating the coercive situation apparent here.

In Martinez v. U.S, 566 A.2d 1049, 1057-1058 (D.C. App. 1989), the court pointed out there was "no evidence [Martinez] had retained a lawyer or that one had been appointed for him when he made his statement to the police. Nor were the statements inculpatory, a point heavily relied upon by the court, fn. 19. Finally, Martinez never contended his statements were involuntary or the result of abusive tactics, (Id. at 1058-9.) Accordingly, Martinez is inapposite and dicta re impeachment.

In State v. Swallow, 405 N.W. 2d 29, (S.D. 1987) the court stated the defendant "does not contend that he was being forced to speak to the investigator, nor does he claim that he was under any physical impairment or subjected to any psychological pressures that resulted in the confession." (Id. at p.39.) This is, once again, not the instant case.

In State v. Thomas 698 S.W.2d 942, (Mo.App. 1985), the

appellate court did not even consider that Thomas had asked for an attorney so as to cut off further questioning, thereby reducing to dicta the following discussion of whether he could be impeached with those statements.(Id. at 947.) Additionally, there was no hint that the statements were not completely voluntary.

In People v. Ricco, 437 N.E.2d 1097, (1982) the appellate court reversed Ricco's conviction since his impeachment was not accompanied by an instruction limiting the use of that impeachment to credibility only. (Id. at p. 1101.) That same defect occurred here, and was compounded by an instruction which urged the jury to consider the impeachment as substantive evidence of the crime charged. (See p. 304 of the Clerk's Transcript attached hereto and incorporated herein.) That issue is further discussed below. Ricco then, supports the respondent.

In Tate v.U.S. 283 F2d 377 (1960), no right to counsel was involved, and the statements were not inculpatory.

In People v. Bacino 354 N.E2d 641, (1976) statements taken in violation of Miranda were allowed for impeachment. The manner in which the statements were elicited does not approach the coercive nature of the statements obtained from respondent Cribas.

U. S. v. McManaman 606 F.2d 919 (10th Cir. 1979) and U.S. v. Frank, 520 F.2d 1287 (2d Cir. 1975) also involved situations were coercion and involuntariness were not a factor. The statements were otherwise trustworthy.

Accordingly, the cases cited by petitioner do not apply factually to the instant case.

Since the statements lacked trustworthiness at the outset, and coercive government misconduct was the catalyst for respondent's statements, they should not be used for any purpose and the petition for certiorari should be denied. (New Jersey v. Portash, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385, (1978).

II

THE JURY WAS MISINSTRUCTED TO CONSIDER THE IMPEACHING STATEMENTS AS SUBSTANTIVE EVIDENCE OF RESPONDENT'S GUILT.

Over one year before the respondent's trial, a Court of Appeal for the state of California held that it was reversible error to fail to instruct a jury sua sponte that statements gained in violation of Miranda and used to impeach a testifying defendant could be used only to assess credibility and could not be used as substantive evidence of guilt. (People v. Duncan (1988) 204 Cal.App.3d 613, 617-22.)

In the instant case, the same error was made and additionally exacerbated by the giving of an erroneous instruction that the illegally gained statements could be used as substantive evidence of guilt. (CT 304, attached and RT 381.)

This error was not brought to any court's attention until now as it went undetected and respondent's conviction was reversed in any event. Counsel found the error by researching cases which noted a limiting instruction was required and then checking the record and finding the wrong instruction was given here. It is true that a subsequent California case has held that such a limiting instruction need not be given sua sponte however there was apparently no erroneous instruction given in that case affirmatively allowing substantive use as occurred here. (cf. People v. Wyatt (1990) 215 Cal.App.3d 255.)

In any event, federal cases have found the lack of such a limiting instruction reversible error. (Hinman v. McCarthy (9th Cir. 1982) 676 F.2d 343.) In Oregon v. Hass (1975) 420 U.S. 714, this Court noted that the jury was instructed to consider defendant's statements, used for impeachment after a Miranda violation, only as to credibility and not guilt.(Id. at p. 717.)

Accordingly, this error illustrates that even if impeachment could have been properly done, it was not.

Because of this error and the use of involuntary and untrustworthy statements, and the reasons set forth in the Brief in Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Charles R. Khoury Jr

Attorney for Respondent Cribas

APPENDIX "A"

CALJIC 2.13 (5TH EDITION)

PRIOR CONSISTENT OR INCONSISTENT STATEMENTS AS EVIDENCE

Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with [his] [her] testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.

[If you disbelieve a witness' testimony that [he] [she] no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by [him] [her] describing that event.]

BEST AVAILABLE COPY

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CASE NUMBER: 91-996

DECLARATION OF SERVICE

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of Hillsborough N.H. in which the mailing occurred and am not a party to the subject cause. My business address is P.O. Box 1066 Wilton, New Hampshire. I served the SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: Original and eleven copies to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, One First Street NE, Washington D.C. 20543 of which a true and correct copy of that document was mailed to each addressee in a separate envelope named as follows:

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I declare under penalty of perjury the above statement is true.
Executed at Wilton N.H. on March 18, 1992.

Charles R. Khoury Jr.